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Nos. 94-1893 and 94-1900

Supreme Court, U.S.
FILED
JUN 6 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

United States of America, *et al.*

and

National Cable Television Association, *et al.*,
Petitioners,

v.

Bell Atlantic Corporation, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF PETITIONERS

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June 6, 1995

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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INTEREST OF *AMICUS CURIAE*

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of petitioners.[1]

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[1] Consistent with S. Ct. R. 37.3, all parties have given CCTA their consent to the filing of this brief. Two members of CCTA, Time Warner Cable and Home Box Office, are not represented by CCTA for purposes of this action.

CCTA is a trade association representing cable television system operators that provide cable television service to nearly six million California residents, as well as cable television programmers and equipment suppliers. CCTA brings information to the Court concerning the effect elimination of the in-region ban on telephone company provision of video programming has had, and will continue to have, on cable television operators and consumers in California. CCTA has unique knowledge of the incentive and ability of local exchange carriers ("LECs") in California—specifically, Pacific Bell ("Pacific") and GTE Corporation—to engage in anticompetitive behavior in a manner that directly affects the ability of cable operators to compete effectively in the marketplace. Notably, this anticompetitive conduct is at the heart of the congressional justification for Section 533(b) of the Communications Act.

Since 1958, CCTA has participated in proceedings before a wide range of administrative, legislative, and judicial bodies on behalf of the cable television industry in California and its individual members. CCTA has a wide range of experience advocating the rights of cable television operators before this Court [2] and before the Court of Appeals for the Ninth Circuit.[3] Most recent and relevant to the questions posed by the petitioners for certiorari, CCTA filed a brief as intervenor-applicant in the Ninth Circuit Court of Appeals when the district court

[2] See *amicus* briefs filed by CCTA in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994) and *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991).

[3] CCTA has filed *amicus* briefs in *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, 754 F.2d 1396 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986); and *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, 13 F.2d 1327 (9th Cir. 1994), *cert. denied*, 114 S. Ct. 2738 (1994).

invalidated the telephone company-cable operator cross-ownership ban at issue in this case.[4]

This *amicus* brief will illustrate that the issues the petitioners ask this Court to resolve will have a substantial impact on competition in the provision of multichannel video programming, the video services market, and the market for local telephone competition as well.[5]

REASONS FOR GRANTING THE PETITION

The central issue in this case is whether a non-content based regulation, which the court of appeals found promotes the significant governmental interest in media outlet diversity and deterrence of anticompetitive behavior,[6] violates the First Amendment because there might be less burdensome alternatives, without regard to how effective such alternatives might be at accomplishing the governmental interest.

To find, as the court of appeals did, that the telephone company-cable television cross-ownership ban was not narrowly tailored enough to pass constitutional muster [7]

[4] See Brief of CCTA in *U S West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994). The court of appeals ultimately denied CCTA intervenor status in that case and, thus, CCTA participated as *amicus curiae*. CCTA, however, participated in joint oral argument of the *U S West* case in its capacity as an intervenor in *Pacific Telesis Group v. United States*, 48 F.3d 1106 (9th Cir. 1994), *rehearing pending*, which also involved a constitutional challenge to Section 533(b). In addition, CCTA was a party in *GTE California, Inc. v. FCC*, 39 F.3d 940 (1994).

[5] In the alternative to this Court's review, CCTA supports the petitioners' request that the decision of the court of appeals be vacated and remanded for further consideration in light of the FCC's action in *Telephone Company-Cable Television Cross-Ownership Rule, Sections 63.54-63.58, Third Report and Order*, FCC 95-203 (released May 16, 1995).

[6] Pet. App. 34a.

[7] Pet. App. 42a.

flies in the face of the "real life" experience CCTA's members have had with anticompetitive conduct by California's LECs. The simplistic assumption that other less burdensome options exist, or that the Federal Communications Commission ("FCC") has the requisite means to enforce conduct-specific regulation, fails to take into account the overwhelming incentive and ability of telephone companies to use their monoply power to cross-subsidize and discriminate against competitors in the video services market.

The cross-ownership ban was first adopted by the FCC in 1970 to address the problem of discrimination against cable companies unaffiliated with LECs and to avoid the extension of the telephone company monopoly into the cable services market.[8] The FCC concluded that "the preservation of . . . competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of [cable] service to the viewing public." [9]

In 1981, the FCC revisited this subject with the issuance of a comprehensive staff report on the agency's cable cross-ownership policies.[10] While the report noted that the cable industry no longer was in its infancy, it concluded that continued prohibition of telephone company-cable television cross-ownership "remains essential." [11] It stated that the restriction should not be lifted until the potential of cable television operators to become genuine competitors of telephone companies with respect

[8] See 47 C.F.R. 64.601 (1971); *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C.2d 307 (1970), aff'd *sub nom. General Tel. Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

[9] 21 F.C.C.2d at 325.

[10] FCC Office of Plans and Policy, *FCC Policy on Cable Ownership, A Staff Report* (Nov. 1981).

[11] *Id.* at 177. *See also id.* at 143 (restriction "must be retained for the time being.").

to local telephone service became more realistic. The report observed that independent cable operators offered the potential "to constrain telephone company market power" and "long run prospects for eliminating the 'local bottleneck' altogether." [12] Thus, the FCC explained, the decision of whether to lift the cross-ownership ban "depends critically on the nature of competition in the provision of local loop services." [13]

In this vein, Congress essentially codified the FCC's cross-ownership rules in Section 533(b) of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. 533(b). It indicated that the ban was intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." [14]

The key factual predicate that prompted the ownership ban still exists today. Specifically, LECs continue to enjoy overwhelming local access market dominance. Nationwide, industry analysts reported last year that aggregate revenues for access services of all competitive local telephone access providers combined are less than one percent of total monopoly LEC access revenues and an even smaller percentage of total revenues.[15] Indeed, in California, local telephone companies retain a *de jure* monopoly [16] and are resisting efforts to open up the local exchange market to meaningful competition.[17]

[12] *Id.* at 160.

[13] *Id.* at 177.

[14] H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984).

[15] Economics and Technology, Inc./Hatfield Associates, Inc., "The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers," at ii (February, 1994).

[16] See *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, CAL. PUB. UTIL. Decision No. 89-10-031.

[17] See Comments of Pacific in *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers*, CAL. PUB. UTIL. Investigation No. 87-11-033 (filed January 31, 1995).

The Ninth Circuit recently reaffirmed that "the BOCs have the incentive to discriminate [in the provision of enhanced services] and the ability to exploit their monopoly control over the local networks to frustrate regulators' attempts to prevent anticompetitive behavior." [18] This incentive to use network facilities to the detriment of competing video programmers and providers is especially strong in the context of LEC-provided video service because the LECs already have a wired connection into nearly every home. Thus, LECs are looking to provide video services to consumers who are their captives for telephony.

CCTA has had first-hand experience with telephone company attempts to exploit their extraordinary market power to gain a competitive advantage in the video services market. For example, in 1986, Pacific constructed a "leaseback" video transport cable system for an independent cable operator in Palo Alto, California, and estimated that the system's annual revenue for the first 15 years would recover its costs and yield a rate of return on Pacific's investment of between 10 and 12.72 percent.[19] Although Pacific's construction costs, in fact, had vastly exceeded its estimate, the company never increased its tariffed rates to the customer.[20] As a result, potential competitors were injured because Pacific required telephone ratepayers to bear the burden of its loss.

[18] *California v. FCC*, 39 F.3d 919, 929 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995).

[19] Application of Pacific Bell for Authority Pursuant to Section 214 of the Communications Act of 1934, and Section 63.01 of the Commission's Rules and Regulations to Construct and Maintain Broadband Cable Distribution Facilities in and around the City of Palo Alto, CA, File No. W-P-C 5753 (filed April, 1986 and amended September, 1986).

[20] See Reply of the California Cable Television Association to Pacific Bell's Opposition to Petitions to Deny, FCC File Nos. W-P-C 6913, 6914, 6915, and 6916, at 39-42 (filed March 11, 1994).

Significantly, this conduct, which violated Pacific's tariff and the FCC's cross-ownership rules, was not prevented by the accounting "safeguards" imposed by the FCC.

Pacific's pending proposals to provide video dialtone service are even more striking.[21] Pacific claims that its $16 billion investment in a new hybrid fiber/coaxial cable telecommunications network is nothing more than a replacement of its copper telephone network and not intended primarily to give Pacific the ability to provide video programming.[22] Therefore, Pacific claims it needs no regulatory approval for most of its investment and has, in fact, initiated construction of its new network with no intervention by the FCC.[23]

On the basis that the $16 billion investment is primarily for the purpose of telephony, Pacific also proposes that its embedded monopoly telephone ratepayers bear the cost of its new video network. Specifically, Pacific proposes to scrap millions of copper wires, substitute broadband coaxial cable "drops", even for households that only want basic telephone service, build a broadband feeder and distribution system to carry both video and telephony, and then charge off 78 percent of the new network to regulated telephony services, when less than half of these costs should be borne by telephone ratepayers.[24] This massive

[21] Applications of Pacific Bell for Authority Under Section 214(a) of the Communications Act to Construct Video Dialtone Facilities, File Nos. W-P-C- 6913, 6914, 6915, 6916 (filed December 20, 1993).

[22] *Id.*

[23] See Letter from Jeffrey Sinsheimer, Director of Regulatory Affairs, CCTA, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC, at 12, FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated April 11, 1995, citing Letter from Alan Ciamporcero, Pacific Telesis, to Kathleen M.H. Wallman, FCC, at 8, dated January 13, 1995.

[24] See Letter from Jeffrey Sinsheimer, Director of Regulatory Affairs, CCTA, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, FCC, Exhibit 1 at 2 (Declaration of Leland L. Johnson, Ph.D.), FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated April 11, 1995.

cost-shifting away from video dialtone users will allow Pacific to underprice other video providers at the same time that it unfairly burdens its ratepayers.

Most significantly, Pacific's video dialtone proposals to provide common carriage service are nothing more than a Trojan Horse for the company's provision of video programming. Specifically, Pacific expects that its offering will be governed by common carrier regulations, although it proposes to grant discriminatory access and rates to a "favored" video programmer.[25] And, if the First Amendment questions before this Court are resolved in a manner that will permit the telephone company to provide video programming in its service area, Pacific intends to purchase this "favored" programmer.[26]

It is far from clear that the FCC possesses the means to police anticompetitive conduct of this sort in the absence of LEC ownership of video programming. It is readily apparent, however, that the agency will not be able to deter LECs from extending their telephone monopolies into the video transport market when they have the added incentive of gaining dominance over the lucrative video programming business. In light of this evidence, it is not apparent why the court of appeals believes that limiting "the telephone companies' editorial control over video programming to a fixed percentage of the channel's available" would be an effective "less-burdensome alternative" to Section 533(b).[27]

Finally, there is simply no evidence that this limited economic regulation has any impact whatsoever on the ability of LECs to get their desired messages to local subscribers. Section 533(b) allows telephone companies ample avenues for communication, including dissemina-

[25] See Letter from Spencer Kaitz, President, CCTA, to Reed Hundt, Chairman, FCC, FCC File Nos. W-P-C 6913, 6914, 6915, 6916, dated September 19, 1994.

[26] *Id.*

[27] Pet. App. 41a.

tion of video programming by any means except LEC-owned in-region cable systems, as well as any expression that does not constitute video programming. In contrast to the minimal effect the cross-ownership ban has on telephone company speech, the regulation promotes competition and ensures that the LEC vision of just one (LEC-owned) wire into each home does not become a reality.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

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be accommodated.[47] Parties addressing limits on LEC use of the video dialtone platforms should comment in this proceeding on the relationship between such channel sharing mechanisms and any proposal to limit LEC use of analog channels. The Third Further Notice also sought comment on two other signal carriage issues: (1) whether the Commission should mandate preferential video dialtone access or rates for commercial broadcasters, public, educational and governmental ("PEG") channels, or other not-for-profit programmers; and (2) whether the Commission should permit LECs to offer preferential treatment to certain programmers on a voluntary ("will carry") basis.[48] Parties should comment in this proceeding on the relationships among mandatory preferential treatment, "will carry," and any proposed limits on a LEC's use of its video dialtone capacity to provide programming directly to subscribers.

23. Another example of potentially anticompetitive conduct that has been cited in the context of cable television service under Title VI involves channel positioning.[49] Programmers assert that cable operators can and do deliberately assign unaffiliated program services to undesirable channel locations.[50] Under Title II, such discriminatory conduct is prohibited. We seek comment on whether LECs that are also video program providers have an increased incentive to use their control over the video dialtone platform to engage in such activities and what, if any, specific safeguards we should implement to prevent such conduct. In particular, we seek comment on whether the channel positioning rules that apply to cable operators in the context of the "must-carry" requirement of Title VI [51] should also apply to video dialtone platform operators providing programming directly to subscribers in their local exchange service areas.

[47] *Id.* at paras. 268-275.

[48] *Id.* at paras. 280-284.

[49] *See* Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order, 8 FCC Rcd 8565, 8583-84, paras. 41-43 (1993).

[50] *See* Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 FCC Rcd 4962, 5040, para. 151 (1990).

b. *Non-Ownership Relationships and Activities Between Telephone Companies and Video Programmers*

24. In the *Video Dialtone Reconsideration Order*, the Commission affirmed, with certain modifications, its decision to permit LECs to enter into non-ownership relationships with video programmers that exceed a carrier-user relationship.[52] Under the modified rules, a LEC is permitted to provide enhanced and other nonregulated services related to the provision of video programming (*e.g.*, billing and collection or video gateway services) to any video programmer in its telephone service area, provided that the area is substantially served (*i.e.*, 70 percent of the households in that area) by a video dialtone platform.[53] In addition, a LEC is not restricted by our

[51] 47 U.S.C. § 534(b)(6). In general, 47 U.S.C. § 534 requires cable operators to carry local television station signals and qualified low power television station signals.

[52] *Video Dialtone Reconsideration Order* at paras. 87-102.

[53] *Id.* at para. 87.

rules regarding other types of non-ownership relationships with video programmers who are not franchised cable operators.[54]

25. At the same time, however, the Commission did not permit LECs to exceed the carrier-user relationship with cable operators, except to provide enhanced or other nonregulated services related to the provision of video programming in an area substantially served by a video dialtone platform, or to lease cable drop wires.[55] In addition, the Commission generally prohibited affiliations between LECs and any video programmer for the purpose of operating a basic video dialtone platform.

26. After *C&P Tel. Co. v. U.S.* and *U S West v. U.S.*, we propose, at a minimum, to retain these restrictions as safeguards against LEC anticompetitive conduct and to promote further LEC deployment of broadband services. We believe that the restrictions on non-ownership affiliations between LECs and cable operators are important to the Commission's goal of promoting competition in the video services marketplace, and are not overbroad infringements on LEC First Amendment rights. Parties should comment on the proposal to retain these safeguards and should describe any specific additional measures they believe necessary to safeguard against anticompetitive conduct by LECs that offer programming on their own video dialtone systems.

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[54] *Id.* at para. 88.

[55] The Commission permits LECs to lease cable drop wires from cable operators, subject to certain conditions. *See Video Dialtone Reconsideration Order* at paras. 54-55.

c. *Acquisition of Cable Facilities*

27. Throughout much of the video dialtone proceeding, the Commission has expressed a concern that LEC acquisition of in-region cable facilities to provide video dialtone could impede competition.[56] In the *Video Dialtone Reconsideration Order*, the Commission substantially affirmed its decision to prohibit telephone companies from acquiring cable facilities in their telephone service areas for the provision of video dialtone.[57] We continue to believe that this ban will benefit the public interest by promoting greater competition in the delivery of video services, increasing the diversity of video programming available to consumers, and advancing the deployment of the national communications infrastructure.[58] We tentatively conclude that the ban on LEC acquisition of cable facilities for the provision of video dialtone does not impermissibly restrict LEC speech under *C&P Tel. Co. v. U.S.* and *U S West v. U.S.*, and seek comment on this conclusion.

28. In the Third Further Notice, the Commission recognized that some markets may be incapable of supporting two video delivery systems. The Commission was concerned that, in such markets, the prohibition could preclude establishment of video dialtone service, thereby denying consumers the benefits of competition and diversity of programming sources that our video dialtone regulatory framework is de-

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[56] *See, First Report and Order,* 7 FCC Rcd at 309-310, para. 17. *See also, Second Report and Order,* at 5837-38, paras. 109-111.

[57] *Video Dialtone Reconsideration Order* at para. 48.

[58] *Id.* at para. 48.

signed to promote. As a result, the Commission requested parties to suggest criteria that would permit us to identify those markets in which two wire-based multi-channel video delivery systems would not be viable.[59] We seek comment on how, if at all, the decisions in *C&P Tel. Co. v. U.S.* and *U S West v. U.S.* should affect our consideration of criteria for allowing exceptions to our two-wire policy. We also seek comment on whether we should ban telephone company acquisition of cable facilities, with or without exceptions, if (a) Title VI applies to telephone companies providing programming on their own video dialtone platforms; or (b) telephone companies are permitted to become traditional cable operators in their own service areas instead of constructing video dialtone platforms.

d. *Joint Marketing and Customer Proprietary Network Information*

29. In the *Video Dialtone Reconsideration Order*, the Commission also affirmed its decision to permit LECs to engage in joint marketing of basic and enhanced video services, and of basic video and non-video services.[60] We found that significant public interest benefits can accrue from the efficiencies and innovations that may be obtained by permitting LECs to engage in joint marketing of basic and enhanced video services, and of basic video and non-video services.[61] We also found that the record on reconsider-

[59] *Id.* at paras. 276-79.

[60] *Id.* at para. 240.

[61] *Id.* at paras. 234-242.

ation did not support a finding that joint marketing of common carrier video and telephony services would have an anticompetitive impact on the provision of video programming to end users. We now seek comment on whether LEC provision of video programming directly to end users requires that we revisit our analysis of joint marketing issues.[62]

30. In the *Bell Atlantic Market Trial Order* the Commission authorized Bell Atlantic to conduct a six-month video dialtone market trial that will include provision of video programming directly to subscribers by a Bell Atlantic affiliate as well as by independent video programmers.[63] Pending resolution of the instant rulemaking proceeding, we conditioned Bell Atlantic's authorization on its compliance with existing safeguards for the provision of nonregulated services, including enhanced services, and with several additional, interim safeguards against discrimination.[64] We seek comment on whether any or all of these interim safeguards should be adopted as permanent requirements for LECs that provide video programming over their own video dialtone platforms.

31. Included among the Commission's existing nonstructural safeguards are customer proprietary network information (CPNI) requirements. Under these requirements, the Commission limits the BOCs' and GTE's use of CPNI; requires them to make CPNI available to competitive enhanced service providers (ESPs) designated by a customer; and requires that

[62] *Id.* at paras. 239-242.

[63] *See Bell Atlantic Market Trial Order*, *supra* note 42.

[64] *Id.* at para. 22.

they make available to ESPs non-proprietary aggregated CPNI on the same terms and conditions on which they make such (CPNI) available to their own enhanced service personnel.[65] In the *Video Dialtone Reconsideration Order*, the Commission affirmed its decision to apply existing enhanced services CPNI rules to video dialtone.[66] We determined that there was insufficient evidence to conclude that our existing CPNI rules do not properly balance our CPNI goals relating to privacy, efficiency, and competitive equity in the context of video dialtone.[67] The Commission also required the BOCs and GTE to provide additional information regarding the kinds of CPNI to which they will have access as a result of providing video dialtone service and indicated its intent to seek further comment on such information.[68] We now seek additional comment and information on whether LEC provision of video programming impacts the balancing of our goals for CPNI.

32. In addition to concerns over possible anticompetitive use of CPNI, parties should discuss whether LEC provision of video programming raises new concerns regarding consumer privacy. Parties that perceive a greater threat to consumer privacy should describe with specificity their concerns, and suggest specific safeguards for protecting consumer privacy, and explain how these suggestions benefit the public interest.

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[65] *Id.* at para. 235.

[66] *Id.* at para. 239.

[67] *Id.* at para. 243 & n.456.

[68] *Id.* at para. 244.

33. We also seek comment on safeguards to ensure nondiscriminatory access to network technical information. In the *Bell Atlantic Market Trial Order*, the Commission required Bell Atlantic to provide all video programmers with nondiscriminatory access to technical information concerning the basic video dialtone platform and related equipment.[69] The Commission also noted that, in the circumstances of the market trial, Bell Atlantic would also be subject to the more specific *Computer III* network disclosure rules.[70] We seek comment on whether the Bell Atlantic condition should be adopted as a permanent safeguard. We also ask parties to address whether the *Computer III* network disclosure rules should be modified in any way for application in the video dialtone context.

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[69] *See Bell Atlantic Market Trial Order* at para. 36.

[70] *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7603-04, para. 70 (1991) (*BOC Safeguards Order*), *vacated in part and remanded, California v. FCC*. *See also* Bell Operating Companies' Joint Petition for Waiver of *Computer II* Rules, DA 95-36 (released January 11, 1995), para. 23 (BOCs must continue to comply with *Computer III* safeguards against discrimination pending Commission action in response to the remand of the *BOC Safeguards Order* in *California v. FCC*, *see infra* note 71. As noted below, *see infra* note 71, the Ninth Circuit set aside, in part, our *BOC Safeguards Order* on review, finding that we had failed to explain adequately our decision to lift structural separation requirements generally, based on the level of network unbundling reflected in the approved BOC ONA plans. *California v. FCC*, 39 F.3d at 929, 930. In any event, we propose here to consider whether structural separation is necessary or appropriate in the context of video programming services. *See infra* at para. 39.

4. *Safeguards Against Cross-Subsidization of Video Programming Activities*

34. In the *Video Dialtone Reconsideration Order*, the Commission determined that price cap regulation and accounting safeguards would be effective to prevent cross-subsidization of video dialtone-related nonregulated activities.[71] We tentatively conclude that these safeguards against cross-subsidization apply to LEC provision of video programming just as they would to any other activity not regulated as Title II common carrier service, and that the existing rules are adequate to forestall cross-subsidy of the video programming activity.[72] We seek comment on these tentative conclusions.

[71] *Video Dialtone Reconsideration Order* at paras. 179-182. The U.S. Court of Appeals for the Ninth Circuit recently vacated in part and remanded the *BOC Safeguards Order*, on the ground that the Commission had not adequately explored how, without full unbundling of BOC networks from ONA, discrimination could be prevented. The Ninth Circuit also held that the Commission did show that its regime of nonstructural safeguards adequately prevented improper cross-subsidization of enhanced services by BOCs. *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California v. FCC*). *See BOC Safeguards Order*, *supra* note 70.

[72] The Commission's accounting safeguards for nonregulated activities apply to most activities that are not classified as common carrier communications services for Title II purposes. Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities. Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and their Affiliates, 2 FCC Rcd 1298, 1307-08, paras. 69-78 (1987) (*Joint Cost Order*). Thus, those safeguards would apply to LEC video programming activities even if LEC provision of video programming were found to be regulated under Title VI.

35. Assuming we do not require structural separation, LECs will have the flexibility to conduct video programming activities both within the telephone operating company and through affiliates. For those video programming activities conducted in the operating company, the LEC will be required to record costs and revenues in accordance with Part 32 of the Commission's Rules, the Uniform System of Accounts (USOA), and to separate the costs of video programming activity from the costs of regulated telephone service in accordance with the Part 64 joint cost rules.[73] We tentatively conclude that these rules are adequate to prevent cross-subsidization of video programming activities. We also tentatively conclude that we will apply to video programming activities the rule adopted in the *Video Dialtone Reconsideration Order* requiring LECs to amend their cost allocation manuals to reflect video dialtone-related nonregulated activities within 30 days of receiving video dialtone facilities authorization. We seek comment on these tentative conclusions.

36. If a LEC chooses for business reasons to provide video programming through an affiliate, the accounting treatment of operating company transactions with that affiliate will be governed by the affiliate transactions rules.[74] We seek comment on whether amendments to those rules are needed to safeguard against abuses in transactions between LECs and affiliated video program providers. Specifically, we

[73] 47 C.F.R. §§ 64.901-905.

[74] 47 C.F.R. § 32.27.

seek comment on whether we should amend Section 32.27 to clarify that any video program provider that is considered, because of a LEC's five percent ownership interest, to be a LEC affiliate for purposes of applying video dialtone safeguards will also be considered an "affiliate" for purposes of the affiliate transactions rule.[75]

5. *Structural Separation*

37. At divestiture, the Commission initially applied the *Computer II* structural separation requirements to the customer premises equipment (CPE) and enhanced services operations of the BOCs.[76] The

[75] The telephone affiliate transaction rules apply to transactions with a company that directly or indirectly controls, is controlled by, or is under common control with the operating company. *See* 47 C.F.R. § 32.9000. A company in which a LEC held a 5 percent ownership interest would not ordinarily fall within this definition. By contrast, the cable rate regulation rules use the five percent benchmark to define an affiliated programmer for the purposes of applying affiliate transaction rules. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527, 4667-68, paras. 269-70 (1994).

[76] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, *Report and Order*, 95 FCC 2d 1117 (1984) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *aff'd on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984), *aff'd sub nom. North American Telecommunications Ass'n. v. FCC*, 772 F.2d 1282 (7th Cir. 1985).

Commission removed the structural separation requirement for CPE in 1987.[77] In reaching that decision, the Commission found that the BOCs had a small share of, and could not dominate, the competitive CPE market;[78] that concerns about cross-subsidy and discrimination could be addressed through nonstructural safeguards; and that the net benefits to telecommunications users of allowing the BOCs flexibility in marketing CPE were greater than the net benefits of structural separation.[79]

38. In the *Computer III* proceeding, the Commission replaced its requirement that BOCs offer enhanced services through separate subsidiaries with a set of nonstructural safeguards. Those nonstructural safeguards were intended to protect against discrimination and cross-subsidization while avoiding the inefficiencies associated with structural separation.[80] Using a cost/benefit analysis, the Commission concluded that, when compared with nonstructural safeguards, the costs of structural separation outweighed the benefits.[81] These costs included decreased efficiency, innovation, and service availability. The Commission determined that the provision of

[77] Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) (*BOC Structural Relief Order*).

[78] *Id.* at 147, paras. 25-26, 28.

[79] *Id.* at 147-48, paras. 29-33.

[80] *Computer III* Remand Proceedings: Bell Operating Company Safeguards; and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 174, at para. 1 (1990).

[81] *BOC Safeguards Order* at 7614, para. & n.169.

enhanced services on an integrated basis would allow BOCs to capture certain efficiencies, and capitalize on economies of scope and cost savings created by removing the need for duplicative personnel for sales, marketing, repair and installation, and research and development. In addition, the Commission believed that structural separation was an unnecessary government intrusion into business judgments regarding corporate organizations.[82]

39. We seek comment on whether our approach to these questions should differ when BOCs provide video programming. Specifically, we seek comment as to whether there are aspects of the video programming business that warrant our treating BOC provision of video programming differently from the way we treat BOC provision of CPE and enhanced services generally. We also seek comment on whether any structural separation requirement should apply to LECs other than the BOCs. Commenting parties should specifically identify what aspects warrant different treatment, and what form of separation would be appropriate. Parties should also offer information concerning the relative costs and benefits of structural separation.

6. *Pole Attachments*

40. The Commission has long been concerned that telephone companies would use their control over poles and conduit space to disadvantage their competition. Section 63.57 of our rules requires LECs seeking to provide channel service to show in their Section 214 applications that the cable system for

[82] *BOC Safeguards Order* at 7624, para. 108.

which they would be providing channel service had pole attachment rights or conduit space available "at reasonable charges and without undue restrictions on the uses that may be made of the channel by the operator." [83] This rule is intended to prevent LECs from foreclosing competition by denying cable systems reasonable access to their pole or conduit space.[84]

41. In the Third Further Notice, the Commission sought comment on whether a similar rule should apply to LECs providing video dialtone service. We now seek additional comment on that proposal in light of *C&P Tel. Co. v. U.S.* and *U S West v. U.S.* Parties should address whether incentives to abuse control over pole and conduit space are increased if a LEC decides to offer video programming within its telephone service area. In addition, as requested in the Third Further Notice, advocates of such a rule should propose specific language, and should explain how the rule would prevent anticompetitive conduct.

[83] *See* 47 C.F.R. § 63.57. *See also Video Dialtone Reconsideration Order* at para. 285. We are aware of the pendency of several complaints alleging that LECs proposing to construct video dialtone systems are charging cable operators unreasonable rates. *See, e.g.*, Chronicle Publishing Company v. GTE Hawaiian Telephone Company (GTE Hawaii), Complaint and Request for Declaratory Ruling, P.A. No. 95-001 (filed October 7, 1994) and Jones Spacelink of Hawaii, Inc. v. GTE Hawaii, Complaint and Request for Declaratory Ruling, P.A. No. 95-002 (filed October 24, 1994).

[84] *Video Dialtone Reconsideration Order* at para. 285.

7. *Legal and Constitutional Issues*

a. *Waiver of the Cross-Ownership Ban*

42. Section 533(b)(4) of the Communications Act[85] provides that, upon a "showing of good cause," the Commission may waive the 1984 Cable Act's cross-ownership ban. Under Section 533(b)(4), a waiver "shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection."[86] In *GTE California, Inc. v. FCC*, the United States Court of Appeals for the Ninth Circuit found moot a case in which the FCC had rescinded a waiver granted under Section 533(b)(4).[87] In the course of so holding, and in response to GTE's argument that the waiver should not have been rescinded because Section 533(b) is unconstitutional, the Ninth Circuit stated that "GTECA did not present the constitutional issue to the Commission at a point in this proceeding where it could have tried to obviate the constitutional question by granting discretionary relief, such as a permanent waiver."[88]

43. In *GTE California v. FCC*, the Ninth Circuit raises the question whether the Commission may establish conditions under which it will waive the telco-cable cross-ownership ban in order to obviate potential constitutional difficulties. For example, the Commission may decide to authorize any telephone

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[85] 47 U.S.C. § 533(b)(4).

[86] *Id.*

[87] *See GTE California v. FCC*, 39 F.3d at 942.

[88] *Id.* at 946.

company to provide video programming, whether or not it has obtained an injunction, if it complies with the safeguards we will establish in this proceeding. Our tentative conclusion is that such a reading of Section 533(b)(4) is consistent with the terms of the statute. "Good cause" is commonly interpreted to include changed circumstances, and the circumstances that led us to institute the cross-ownership rule in 1970 have changed dramatically. The cable industry is no longer a fledgling industry. Instead, as the Supreme Court recently recognized, "Congress found that over 60 percent of the households with television sets subscribe to cable . . . and for those households cable has replaced over-the-air broadcast television as the primary provider of video programming."[89]

44. We also tentatively conclude that the safeguards we will establish will constitute "particular circumstances . . . , taking into account the policy" of Section 533(b), under which waivers are warranted. We do not intend to waive the telco-cable cross-ownership rule altogether, so that telephone companies may purchase cable companies that do not face competition and offer their own programming via a monopoly cable system. Rather, and in fulfillment of the policy underlying Section 533(b), we intend to promote competition in the multi-channel video programming market by establishing particular conditions under which telephone companies may establish video dialtone systems that will compete with existing cable operators, thus providing consumers with a choice of multi-channel video systems.

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[89] *Turner Broadcasting System, Inc. v. FCC,* 114 S. Ct. 2445, 2454 (1994).

45. The United States Court of Appeals for the District of Columbia Circuit recognized, in *NCTA v. FCC (1990)*, that "the policy of this subsection is to promote competition." [90] However, in that decision the D.C. Circuit also appeared to give a narrow reading to the scope of the waiver provision. Specifically, the court of appeals remanded a decision in which the Commission had granted a waiver because the court concluded that the Commission had not shown that the participation of an affiliate of a telephone company in constructing transmission facilities was "essential to the success" of an experimental video programming project.[91] But at that time no court had declared Section 533(b) unconstitutional, and the D.C. Circuit did not consider whether a broader reading of Section 533(b)(4) was appropriate to render the provision constitutional. The Supreme Court has recently reiterated that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." [92] A reading of the waiver provision that authorizes telephone companies that comply with the safeguards we will establish to provide video programming should render Section 533(b) constitutional, because in those circumstances any burden on speech by telephone companies will be minimal. Hence, under *U.S. v. X-Citement Video*, a broad interpretation of Section 533(b)(4) seems warranted. We seek comment on these tentative conclusions.

[90] *NCTA v. FCC (1990)*, 914 F.2d at 287.

[91] *Id.* at 289.

[92] *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 467 (1994) (*U.S. v. X-Citement Video*).

b. *Constitutionality of Proposed Safeguards*

46. As the Court of Appeals for the Fourth Circuit stated in *C&P Tel. Co. v. U.S.*, in order for a content-neutral government regulation of speech, such as the cross-ownership ban, to be constitutional, that regulation must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." [93] The court determined that the government's interests in promoting competition and in facilitating the availability of multiple informaton sources are significant. The court decided, however, that the ban against telephone companies operating as cable service providers was not narrowly tailored and that there were available less burdensome alternatives to the ban.[94] The court observed that the Commission had already identified one possible alternative in its recommendation to Congress regarding repeal of the ban: Congress could limit the telephone company to a fixed percentage of available channels, while requiring the remainder of channels to be made available to others on a common carrier basis.[95] Finally, the court determined that, under the

[93] *C&P Tel. Co. v. U.S.* slip op. at 31 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

[94] *C&P Tel. Co. v. U.S.* slip op. at 38.

[95] *Id.* at 38-39 & n.34 (citing *Video Dialtone Reconsideration Order*). While the court discussed the availability of options less burdensome than the cross-ownership ban, it did not address the constitutionality of any such alternative. The court cited the alternative "not to imply *its* constitutionality, but only to show [the ban] itself is unconstitutional." *Id.* at 39 n.34.

ban, there did not exist for telephone companies ample alternative methods of communication.[96]

47. In *U S West v. U.S.*, the Court of Appeals for the Ninth Circuit agreed with the Fourth Circuit that (assuming it served a significant government interest) the ban was not sufficiently narrowly tailored. The court found that the evidence submitted by U S West demonstrated that the procompetitive goals of the ban can be "achieved through a variety of less speech-restrictive means."[97] Unlike the Fourth Circuit, however, the Ninth Circuit, determining that it was unnecessary to do so, did not reach the issue of the availability of "ample alternative channels of communication."[98]

48. With respect to all proposals set forth above for safeguards on LEC provision of video programming, we seek comment on whether such safeguards, whether individually, or in any combination, would be consistent with the First Amendment, the Fourth Circuit's decision in *C&P Tel. Co. v. U.S.*, and the Ninth Circuit's decision in *U S West v. U.S.*

IV. *EX PARTE* PRESENTATIONS

49. This Fourth Further Notice of Proposed Rulemaking is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

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[96] *Id.* at 40.

[97] *U S West v. U.S.* slip op. at 15910.

[98] *Id.* at 15913.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

50. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's Initial Regulatory Flexibility Analysis with respect to the *Fourth Further Notice of Proposed Rulemaking* is as follows:

51. *Reason for Action*: The Commission is issuing this *Fourth Further Notice of Proposed Rulemaking* to consider whether additional or modified safeguards and rule changes may be necessary or appropriate in the context of the video dialtone regulatory framework, when a telephone company provides video programming directly to subscribers in its telephone service area.

52. *Objectives*: The objective of the *Fourth Further Notice of Proposed Rulemaking* is to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

53. *Legal Basis*: The *Fourth Further Notice of Proposed Rulemaking* is adopted pursuant to Sections 1, 2, 4, 201-205, 215, 218, 220, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201-205, 215, 218, 220, and 303(r).

54. *Description, potential impact, and number of small entities affected*: Any rule changes that might occur as a result of this proceeding could impact entities which are small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our

findings in the Final Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Fourth Further Notice of Proposed Rulemaking* to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601, *et seq.*

55. *Reporting, recordkeeping, and other compliance requirement*: None.

56. *Federal rules which overlap, duplicate or conflict with the Commission's proposal*: None.

57. *Any significant alternatives minimizing impact on small entities and consistent with state objectives*: The *Fourth Further Notice of Proposed Rulemaking* seeks comment on a variety of alternatives.

58. *Comments are solicited*: Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this *Fourth Further Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

VI. COMMENT FILING DATES

59. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before March 6, 1995, and reply comments on or before March 21, 1995. To

file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554, with a copy to Peggy Reitzel of the Common Carrier Bureau, Room 544, and James Yancey of the Cable Services Bureau, Room 408C. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C.

VII. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 215, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, and 220, a FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM F. CATON
Acting Secretary

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, *Fourth Further Notice of Proposed Rulemaking*

The Commission, in this *Fourth Further Notice of Proposed Rulemaking (Notice)* commences a proceeding to consider the adoption of rules governing telephone companies' provision of video programming directly to their video dialtone subscribers. This action is in response to recent court decisions, such as the Fourth Circuit decision in *C&P Tel. Co. v. FCC.*[1] In that decision, the U.S. Court of Appeals held that the cross-ownership ban established by the Cable Communications Policy Act of 1984 violates the First Amendment rights of telephone companies because the ban is not "narrowly tailored to serve a significant government interest." Among many issues, this *Notice* seeks comment on (1) a tentative conclusion that telephone companies should be allowed to become programmers on their own video dialtone platforms, subject to appropriate safeguards, and that, in light of the public interest benefits of video dialtone, the Commission should not ban telephone companies from providing their own video programming over their own video dialtone platforms; (2) whether the Commission has authority to require telephone companies

[1] *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, No. 93-2340 (4th Cir.Nov. 21, 1994); *U.S. West, Inc. v. United States*, No. CV-93-01523-BJR (9th Cir. December 30, 1994).

that wish to provide video programming directly to subscribers in their own service areas to do so over a video dialtone system and not over a traditional cable television facility; and (3) the extent to which Title II and Title VI of the Communications Act, which govern common carrier and cable services, respectively, should apply to telephone companies in their provision of video programming to subscribers.

My support for the development of video dialtone has been based on several principles, including (1) establishing a regulatory framework that could provide incentives for additional facilities-based competition for video programming services, and (2) providing regulatory incentives for telephone company investment in network modernization.[2] I also have observed that our consideration of video dialtone issues should reflect the shifting competitive and regulatory environment in the multichannel video marketplace.[3] I write separately regarding this *Notice*, therefore, in order to highlight my interest in certain

[2] *See* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63-58 (CC Docket No. 87-266), *Second Report and Order, Recommendations to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781 (1992) (*"Second Report and Order"*) (Separate Statement of Commissioner Andrew C. Barrett).

[3] *See* In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63-58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, *Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, released November 7, 1994 ("Memorandum Opinion and Order") (Separate Statement of Commissioner Andrew C. Barrett).

competitive issues in the marketplace for multichannel video programming as well as for broadband services that arise as the Commission initiates the process to enable telephone companies to provide video programming directly to their video dialtone subscribers. Most fundamentally, while I underscore my support for video dialtone as a major step in the regulation of converging industries,[4] I believe it is important to remain careful in addressing the tendency toward the "cablizing" of video dialtone systems. In our recent reconsideration of the regulatory framework governing video dialtone, with respect to the Commission's decision to reject the "anchor programmer" structure, I observed that allowing video programmers such wide latitude to participate in the operation of the basic video dialtone platform would heighten the risk of discrimination in the provision of programming services.[5] To the extent that economic or marketing considerations would create incentives to rely primarily on a single programmer, I also expressed concerns that results of an anchor programmer structure would be more consistent with "cable" service rather than the common carrier obligations under Title II of the Communications Act.

I question, therefore, whether many similar public policy issues are raised now as we consider the rules

[4] *See Second Report and Order* (Separate Statement of Commissioner Andrew C. Barrett); *Order and Authorization, New Jersey Bell Telephone Company video Dialtone Application* (Dover Township, NJ), FCC 94-180, (released July 18, 1994) (Separate Statement of Commissioner Andrew C. Barrett); and *Memorandum Opinion and Order* (Separate Statement of Commissioner Andrew C. Barrett).

[5] *See Memorandum Opinion and Order* (Separate Statement of Commissioner Andrew C. Barrett).

governing telephone companies as they provide video programming directly to their subscribers as programmers on their video dialtone platforms. If similar policy questions are raised in this context, I especially am interested in comments regarding how the Commission may resolve these policy questions with some degree of consistency, recognize the evident incentives for local exchange carriers to structure their video dialtone systems in many ways like a cable system, and yet maintain the distinct role of video dialtone as a common carrier service. For instance, we now face questions including whether to apply Title II or Title VI to a LEC's video dialtone system where it serves as a programmer, and whether to require the LEC to pursue a franchise from local authorities for its video dialtone system. In this context, and in response to recent court decisions, I am interested in comments that address ways in which the Commission can maintain a common carrier model for video dialtone systems, and avoid potential regulatory disparities and competitive inequities in the multichannel video marketplace.

I also have previously stated that the Commission's decision to continue along the path of authorizing video dialtone service is a fundamental step toward replacing the function of cable rate regulation with competitive constraints in the multichannel video marketplace.[6] In doing so, I am concerned that those competitive constraints must be founded on a policy that avoids regulatory disparities among potential competitors. This proceeding poses an array of ques-

[6] *See Second Report and Order*, (Separate Statement of Commissioner Andrew C. Barrett).

tions, and the Commission's answers to those questions will determine the extent to which a truly competitive marketplace for multichannel programming and broadband services will emerge. Thus, in this proceeding, and as a result of the concurrent decision to grant Bell Atlantic's 214 application for the northern Virginia market trial subject to the policies determined in this proceeding,[7] I am concerned that we may already need to consider issues beyond the immediate questions regarding telephone companies' provision of programming on their video dialtone systems as we are simultaneously generating another range of issues concerning the competitive role of cable operators in responding to the advent of video dialtone systems. For example, where a cable company is able to obtain approval from state authorities to provide local exchange service in a community where they already provide what we regard as "cable

[7] In the Commission's separate decision to grant Bell Atlantic's application to commence a six-month market trial of video dialtone service in Arlington, Virginia, the Commission also granted Bell Atlantic's proposal to allow its affiliate, Bell Atlantic Video Systems (BVS), to provide video programming via the Bell Atlantic video dialtone platform. In addition to requiring Bell Atlantic to comply with various safeguards, the Commission also stated that Bell Atlantic would be required to comply with any additional safeguards that the Commission might adopt in future proceedings, including this rulemaking. *See* In the Matter of the Application of the Chesapeake and Potomac Telephone Company of Virginia, For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities to test a new technology for use in providing video dialtone within a geographically defined trial area in northern Virginia, *Order and Authorization*, (January 12, 1994).

television service", I would question how we should respond to requests from the company if it seeks to be regulated under Title II as a "video dialtone system", particularly if it finds those regulatory provisions more favorable?

Furthermore, as the Commission moves forward in the context of an important new aspect of developing a regulatory framework for video dialtone systems, I am concerned that we uphold our responsibilities to address a number of other parallel issues in a manner that provides a similar measure of flexibility, where necessary. As I previously have observed, given that this proceeding embodies a measure of flexibility for LECs in providing programming through video dialtone systems, I still will be interested in the Commission's actions to provide substantial flexibility to cable operators in order to augment the cable rate regulations.[8] To that end, among several considerations, I would suggest that we may need to establish final cost-of-service rules as well as standards for cable operators to allocate costs and to pursue incentives to upgrade their distribution networks to provide voice services, improved video services, or other broadband services.

[8] *See Memorandum Opinion and Order* (Separate Statement of Commissioner Andrew C. Barrett).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Telco Programming on Video Dialtone Networks (CC Docket No. 87-266)

I have been—and I remain—an enthusiastic supporter of video dialtone. I fully subscribe to the notion that VDT can interject needed competition into the video transport market, stimulate desirable investment in the telecommunications infrastructure, and promote the availability of new programming services. Consumers can reap substantial benefits from a common carrier-based video delivery system, with multiple customer-programmers competing with each other as well as with video programmers using other delivery media.

We begin today to grapple with complex issues of constitutional and statutory analysis that go beyond the web of policy considerations involved in our prior video dialtone decisions. Heretofore, a central tenet of our video dialtone regime was the notion that local exchange carriers were to provide only a transparent conduit, with the role of "customer-programmer" played entirely by unaffiliated entities. We are now contemplating a significant change in that aspect of the VDT framework.

We are brought to the present situation by a series of judicial decisions regarding the First Amendment rights of local exchange carriers. Two circuit courts, as well as district courts in three other jurisdictions, have now held that the cable-telco cross-ownership provisions of the 1984 Cable Act are unconstitutional.

This rulemaking ensures that we will consider the full range of issues flowing from these judicial decisions.

For example, we need to consider whether we can or should or must enable the telephone companies to serve as customer-programmers on their own VDT platforms. We need to think through carefully what statutory and regulatory provisions will attach to such activities. We also need to step back, review the big picture, and confirm that our decisions enhance the prospects for vigorous, sustainable, and fair competition.

I am increasingly inclined to believe that consumer benefits can result from permitting carriers to provide video programming on their own VDT platforms. I further believe we can craft safeguards that protect consumers and independent video programmers. I look forward to considering the responses of interested parties to the Notice and to completing this new phase of the rulemaking as quickly as we can—with due regard for the complexity and the importance of the issues before us.

SEPARATE STATEMENT OF COMMISSIONER RACHELLE B. CHONG

Re: Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, *Fourth Further Notice of Proposed Rulemaking* (CC Docket No. 87-266)

In October of last year, I joined my colleagues in voting to affirm and clarify the Commission's video dialtone rules. That action on reconsideration underscored this Commission's firm commitment to regulatory policies designed to enhance competition in the delivery of video services to consumers. The video dialtone rules provide a regulatory framework that permits telephone companies to compete as common carriers in the market for multichannel video services. Consistent with the telephone company-cable television cross-ownership ban enacted by Congress in the 1984 Cable Act,[1] our video dialtone rules currently do not permit telephone companies to provide video programming directly to subscribers over their own common carrier video dialtone platforms.[2]

Recent judicial decisions have struck down the statutory cross-ownership ban as violative of telephone companies' First Amendment rights to speak via video programming within the area served by their common carrier transmission networks.[3] With

[1] 47 U.S.C. § 533(b).

[2] 47 C.F.R. § 63.54(d)(2) (1993).

[3] *See, e.g., Chesapeake & Potomac Tel. Co. of Virginia v. United States*, No. 93-2340 (4th Cir. Nov. 21, 1994); *U S West, Inc. v. United States*, No. CV-93-01523-BJR (9th Cir. Dec. 30, 1994).

these court opinions in hand, telephone companies now seek to furnish video programming over their video dialtone platforms, alongside competing unaffiliated video information providers. Thus, telephone companies seek authority to not only provide transmission facilities for video programming but to control the content of that programming over their own facilities in their role as video information providers. The legal landscape upon which video dialtone was conceived has shifted. As a consequence, video dialtone service and traditional cable television service may no longer seem, as one court observed, like "very different creatures."[4]

Due to these developments, we now address complex and important legal and public policy issues. We ask how telephone company provision of video programming over video dialtone platforms should be regulated in the public interest. Should the Title II common carrier provisions of the Communications Act govern exclusively? What relevance does or should Title VI of the Act, governing cable communications, have in this context? Should some, but not all, provisions of Title VI apply in these circumstances? And how can we resolve these regulatory questions with fidelity to the judicially-recognized First Amendment rights of telephone companies? These are some (though certainly not all) of the questions we must grapple with, and resolve, in the months ahead.

The communications world has undergone dramatic transformation since 1934, when the basic elements

[4] *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994).

of Title II became law; since 1984, when Congress codified much of Title VI and enacted the statutory cross-ownership ban; and indeed even in the last two years since Congress amended Title VI by enacting the Cable Act of 1992.[5] As I noted in my separate statement to the video dialtone reconsideration order, I look forward to a day "when any entity can enter any sector of the communications market and compete according to the same ground rules."[6] To achieve that goal, we must strive for open communications markets, robust and fair competition, and regulatory parity to the extent possible.

Members of Congress have recognized that these converging communications services no longer fit neatly into the existing titles of the Communications Act and are actively considering changes to the statute. While Congress debates statutory reform, I believe we must forge ahead and address these challenging issues. We should strive to reach the best public interest result we can, consistent with existing law. I urge all interested parties to join in this critical debate and assist us in our task by filing detailed comments that help us resolve these issues.

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] *See Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, CC Docket No. 87-266, FCC 94-269 (released Nov. 7, 1994) (Separate Statement of Commissioner Rachelle B. Chong at 5).

APPENDIX E

Section 613(b) of the Communications Act of 1934, as amended, 47 U.S.C. 533(b), provides:

(b) Common carriers; direct video programming; exception; waiver

(1) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

(2) It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of this chapter, to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

(3) This subsection shall not apply to any common carrier to the extent such carrier provides telephone exchange service in any rural area (as defined by the Commission).

(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by,

controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may, on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

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